IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

CRIMINAL APPEAL NO. 854 OF 2001

PIRYA PARMAN SWAMI)
R/at Marol Pipeline,Neharunagar)
Andheri (East) MUMBAI - 59) ..APPELLANT

Versus

STATE OF MAHARASHTRA) ..RESPONDENT

Mr. Abhaykumar Apte with S. S. Borkar for appellant

Mr. P.S. Hingorani, APP

CORAM:-SMT. RANJANA DESAI &

D. G. KARNIK, JJ.

DATED ON WHICH THE JUDGMENT RESERVED:-4TH MAY, 2006

DATED ON WHICH THE JUDGMENT PRONOUNCED:-5TH MAY, 2006

JUDGMENT:-(Smt. Ranjana Desai, J.)

. The appellant (original accused 1) along with one Jaybalan Kanaiya Tevar (original accused 2) and three other absconding accused is alleged to have committed the offence of dacoity with murder punishable under section 396 of the Indian Penal Code ("I.P.C." for short) and also the offence of possessing and using fire-arm without holding valid authorization punishable under Section 3 read

with Section 25 and Section 5 read with Section 27 of the Arms Act. Since three of the accused were absconding the appellant was tried with Jaybalan Tevar, A-2 for the above offences in the court of 2nd Adhoc Addl. Sessions Judge, Pune in Sessions Case No. 312 of 2000. By his judgment and order dated 29/9/05 the learned Sessions Judge acquitted the appellant of the offence punishable under Section 396 of the I.P.C. and also of the offences punishable under Section 3 read with Section 25 and Section 5 read with Section 27 of the Arms Act. He, however, convicted him of the offence punishable under Section 302 read with Section 34 of the I.P.C. and sentenced him to suffer imprisonment for life and to pay a fine of Rs.500/-, in default to suffer R.I. for one month. He also convicted him of the offence punishable under Section 392 read with Section 34 of the I.P.C. and sentenced him to suffer R.I. for one year and to pay a fine of Rs.500/-, in default to suffer R.I. for one month. The substantive sentences were ordered to run concurrently. A-2 Jaybalan Tevar was acquitted of all the offences. Being aggrieved by this judgment and order the appellant has preferred this appeal.

2. Shortly stated the prosecution story is that PW 3 Jayachandran Solai Nadar had engaged deceased Zunjar Lala Bhise as his driver and deceased Hanumant Shelar as his cleaner, on his Tempo MH-12/6000. PW 3 Jayachandran is doing his business at Saki Naka, Mumbai. He deals in eggs. A-1 was working with him as driver about three years prior to the incident in question. As A-1 was involved in thefts Jayachandran had removed him from service in 1998.

3. On 21/1/2000 Jayachandran had sent his Tempo for making purchase of eggs. Deceased Zunjar Lala was the driver and deceased Hanumant Shelar was the cleaner. A sum of Rs.1,40,000/- was given by Jayachandran to the driver for making payment for purchase of eggs. It appears that on the way A-1 along with three other persons had asked for lift from Zunjar Lala at Airoli Toll Naka. On the way according to the prosecution A-1 and others murdered Zunjar Lala Bhise and Hanumant Shelar. They dumped their bodies near Raviraj Industries in Dange chowk at village Takavade. The accused ran away with the sum of Rs.1,40,000/- which was given by Jayachandran to the driver and the cleaner.

4. PW 1 Manohar Sakharam Dabhade, who saw the dead bodies, lodged his complaint with Wakad Police Chowki. It is at Exhibit-14. Investigation was started on the basis of this complaint. Appellant and A-2 came to be arrested. Other accused could not be arrested as they were absconding. After completion of the investigation the appellant and A-2 came to be charged as aforesaid.

5. In support of its case, the prosecution examined as many as nine witnesses. Star witness of the prosecution is PW 3 Jayachandran, the owner of the tempo. PW 4 Dayanadeo Shinde is the pancha to the panchnama under which weapons and cash were recovered at the instance of the appellant. PW 7 Dr. Mohan Halloor had done post-mortem on the deceased. Details of the investigation were given by PW 9 API Rangnath Gaikar of Paud Police Station. The appellant denied the prosecution case. He claimed to be innocent. After perusing the evidence on record the learned Sessions Judge convicted the appellant as aforesaid and hence this appeal.

6. We have heard at considerable length Mr. Apte, the learned counsel appearing for the appellant and

Mr. Hingorani, the learned APP. With the assistance of the learned Counsel, we have gone through the record and the evidence.

7. Mr. Apte, the learned counsel appearing for the appellant contended that the prosecution case rests entirely on PW 3 Jayachandran, who is an interested witness and hence it is risky to rely on his evidence. He submitted that no documentary evidence is produced on record by Jayachandran to establish that in fact he had engaged the services of the deceased and entrusted a huge amount of Rs.1,40,000/- with them. He submitted that there is no evidence to establish that A-1 was working as a driver of Jayachandran and Jayachandran had removed him. Mr. Apte pointed out that the entire story that A-2 brought the appellant and the others in the Maruti Car to Airoli Toll Naka and from there lift was taken from the deceased is a fabricated story. The learned Sessions Judge has disbelieved this story. In fact he has acquitted A-2. Therefore, there is no guarantee that the prosecution story sofar as it relates to the appellant is true. Mr. Apte contended that PW 6 pancha Rajendra Raghunath Gaikwad has turned hostile. Therefore, seizure of clothes of the

appellant is not proved. PW 4 Dayanadeo Tatyaba Shinde, who is a pancha to the arrest panchnama and also pancha to the panchnamas in connection with discovery of weapons at the instance of the appellant, is the servant of PW 3 Jayachandran. Therefore, he is also an interested witness. No reliance can be placed on him. Mr. Apte, therefore, contended that the conviction and sentence of the appellant deserves to be set aside.

8. As against that Mr Hingorani, learned APP contended that the evidence of PW 3 Jayachandran inspires confidence. The discovery of weapons at the instance of the appellant is proved. The weapons were found blood stained. Though PW 6 Rajendra Gaikwad the pancha has turned hostile, PW 9 API Gaikar has proved the seizure of clothes of the appellant. The clothes of the appellant were also blood stained. Blood stains were found on the clothes of the deceased; Blood stains were found on the weapons recovered at the instance of the appellant. The learned APP submitted that this is a clinching piece of evidence and, therefore, even if some part of the prosecution story is not accepted by the learned Sessions Judge, sofar as the evidence adduced by the prosecution, with

regard to involvement of the appellant is concerned, it being credible deserves to be accepted. The learned APP contended that no interference is necessary with the impugned judgment and order.

9. It is true that the prosecution story rests on PW 3 Jayachandran. He has stated that he is doing business at Saki Naka, Mumbai. He deals in eggs. According to him the tempo MH-12/6000 is owned by him. He has stated that his driver Bapu who had gone on leave had engaged deceased Zunjar Lala as driver and deceased Hanumant Shelar as cleaner on the said tempo with his consent. He has further stated that A-1 was working with him as driver for about three years prior to the incident. However, in the year 1998 he had removed him from service because he was involved in thefts. Jayachandran has stated that on 21/1/2000 he had sent his tempo to Pune for making purchase of eggs. Zunjar Lala was the driver and Hanumant Shelar was the cleaner of that vehicle. He had given a cash amount of Rs.1,40,000/- to Zunjar Lala for making payment for purchase of eggs. The said amount was given in two bundles. One bundle contained Rs.90,000/- while the other bundle contained Rs.50,000/-. The bundle containing Rs.90,000/- was kept below the seat of

the driver while the bundle containing Rs.50,000/- was kept behind the back of the cleaner's seat. At about 12/12-15 in the night of 21/1/2000 the tempo started proceeding towards Pune.

10. Jayachandran has stated that at about 1-30 p.m. on 22/1/2000 he received a phone call from Zunjar Lala from the petrol pump at Raigad. Zunjar Lala informed him that the appellant had come to Airoli Toll Naka along with three other persons in an Esteem car. He had asked for lift. Accordingly he gave lift upto Raigad petrol pump. When the tempo halted at Raigad petrol pump, the appellant went away for smoking. Taking advantage of the fact that the appellant had gone for smoking, he contacted Jayachandran on phone. He told Jayachandran that the appellant wanted lift upto Pune. Jayachandran permitted Zunjar Lala to give lift to the appellant and others upto Pune but he told him to take care. According to Jayachandran at about 12 noon on 22/1/02, he received a phone call from Wakad Police Chowki. The police asked whether he was the owner of motor vehicle No. MH-12/6000. When he replied in the affirmative the police told him that his driver and cleaner were murdered. Jayachandran told them about the phone

call which he had received from his driver from Raigad petrol pump. He then went to Wakad police chowki. He was shown two dead bodies. He identified them as driver Zunjar Lala and his cleaner Hanumant Shelar.

11. This witness has been cross-examined at great length. It was argued that he is an interested person. He is interested in recovering his money, therefore, he has falsely implicated the appellant. We find no substance in this criticism. His evidence appears to us to be most natural and consistent. It inspires confidence. There are no omissions in his evidence. This is not disputed by Mr. Apte the learned counsel appearing for the appellant. We, therefore, find no difficulty in accepting the evidence of Jayachandaran as truthful.

12. PW 4 is Dayanadeo Tatyaba Shinde. He has stated that on 23rd January, 2000 he was called by the police to act as the pancha. The police effected the arrest of the appellant. The search of the appellant was taken. Gold chain and wrist watch were attached. Panchnama Exhibit 19 was drawn. He signed on it. He has also stated that

the appellant made a statement that he had kept money and other articles in a bag and he will show the place where the bag is kept. He led the police and the panchas to village Tunga. The vehicle was stopped in a square. Then the appellant took them in one by-lane. He stopped in front of one room. The police and the pancha went with the appellant. The appellant climbed up in that room with ladder. They followed him. There was one bag below an iron cot. The appellant took out the currency notes which were below the clothes inside that bag. The total amount was Rs.15,000/-. There were weapons below the cot. The weapons were a sword, one sickle (koyata) and one Sura. All these articles were attached under panchnama Exhibit 21. This witness has been cross-examined. However, the defence has not been able to elicit anything in the cross-examination from which it can be said that he is an unreliable witness. The only criticism levelled against this witness is that he is an employee of Jayachandran. It is contended that he is an interested witness and hence no reliance should be placed on him. We reject this submission. It is well settled that the evidence of interested witness can also be relied upon if it is found credible. We find this witness to be a

reliable witness.

13. It is true that PW 6 Rajendra Gaikwad who was the pancha to the panchnama under which clothes of the appellant were seized has turned hostile. However, in this connection reliance can be placed on the evidence of PW 9 API Gaikar, the investigating officer. He has proved the panchnama under which clothes of the appellant were taken charge of.

14. On this point the learned Sessions Judge has rightly relied on the judgment of the Supreme Court in **State Govt. of NCT of Delhi v. Sunil & Anr. 2001 SCC (Cri.) 248**. In that case it was argued that the seizure memo was not attested by any independent witness. The Supreme Court held that when there is evidence of police officer regarding the recovery at the instance of the accused, absence of independent witness would not damage the prosecution case. It is for the accused to show that such evidence is unreliable. In this case the witness has not been able to show that the investigating officer is not reliable. We do not find that the investigating officer has made any effort to falsely implicate the accused. There is

nothing on record to establish that the investigating officer had any axe to grind against the appellant. Therefore, his evidence can safely be relied upon.

15. Sofar as the seizure of the clothes of the accused is concerned, PW 9 API Rangnath Gaikar has stated that police constable Kudale produced the clothes which were on the person of the deceased and they were attached under panchnamas Exh.-10 and 11. The Chemical Analyser's report states that human blood was detected on the clothes of the deceased. The group of blood detected on the clothes of deceased Zunjar Lala was 'B' while the group of blood detected on the clothes of deceased Hanumant Shelar was 'O'. The blood found on the clothes of the appellant was 'B' and 'O'antigens. Human blood was also detected on the weapons. The blood on the weapons was 'B' and 'O' antigens. This certainly cannot be the blood group of any one person. It has to be blood of two different persons i.e. deceased Zunjar Lala and deceased Hanumant Shelar. Though the Chemical Analyser could not give blood group of the deceased, the fact that the blood group of the blood found on the clothes of the deceased tallies with the blood

found on the weapons and the clothes of the appellant is an inculpating circumstance against the appellant.

16. In our opinion, the Chemical Analyser's report reinforces the prosecution case. Besides as regards these circumstances questions were asked to the appellant in his statement recorded under Section 313 of the Code of Criminal Procedure He has denied these circumstances and stated that they are false. We are, therefore, of the opinion that the fact that the appellant has given no explanation as regards finding of blood on his clothes provides a missing link in the chain of circumstances which points to his guilt.

17. It is true that A-2 has been acquitted and the learned Sessions Judge has not placed reliance on the prosecution case that an Esteem car was used by A-2. It is true that, that part of evidence of the prosecution has been disbelieved but that, in our opinion, does not damage the prosecution case against A-1.

18. Sofar as A-1 is concerned, the evidence of PW 3 Jayachandran, PW 4 Dayanadeo Shinde, PW 9 API

Gaikar establishes the prosecution case beyond doubt. It was argued that the prosecution story that cash of Rs.1,40,000/- was given to the appellant is false because only Rs.15,000/- were recovered. We find no substance in this argument also. There is no dispute about the fact that Zunjar Lala and Hanumant Shelar were brutally murdered. PW 7 Dr. Mohan Halloor has proved the post-mortem notes. This certainly is not the job of one person. The appellant was accompanied by others. Obviously the booty was shared by all. The submission that only a sum of Rs.15,000/- was found with the appellant and, therefore, the prosecution story is false must, therefore, be rejected. 19. In the ultimate analysis, we are of the opinion that the prosecution has proved its case beyond reasonable doubt. There is no substance in the appeal. Appeal is, therefore, rejected.

20. Before we close, we must refer to a very disturbing facet of this case. In this case the Chemical Analyser has not been able to determine the blood group of the appellant and the deceased. The incident is dated 22/1/2000. The samples were drawn on 28/1/2000. We are informed that they were

sent to the Chemical Analyser on the same day. They were received in the Chemical Analyser's office on 31/1/2000. The prosecution has not explained why it took three days for the samples to reach Chemical Analyser's office. Carrier is not examined. We are informed that the analysis was done on 2/2/2000. But the Chemical Analyser's report is dated 17/5/2000. There is nothing on record to show how the police preserved the samples till they reached the Chemical Analyser's office. It is not understood as to why the Chemical Analyser's report was sent as late as on 17/5/2000. In any case, if the Chemical Analyser could not analyse the blood of the appellant because the sample was disintegrated, he ought to have informed this fact to the police and asked for a fresh sample forthwith. It was possible for the police to draw a fresh sample and send it to the Chemical Analyser and call for a fresh report.

21. As directed by us today the investigating officer, PI Rangnath Gaikar, who is presently attached to the Colaba Police Station is present in the court. Shri Gaikar could not tell us why the carrier was not examined. It is claimed that the samples were sent on 28/1/2000. To prove this

carrier should have been examined. If this claim is true how could the samples have reached the Chemical Analyser on 31/1/2000. It is possible that the samples were sent on 31/1/2000 and, therefore, the carrier is not examined. We asked him how the samples were preserved. He stated that they were kept in the muddemal room in the police station. We are shocked at this negligence. It is common knowledge that blood samples should be preserved in cold storage. If such a facility is not available it must be made available to the police. We are extremely unhappy about the manner in which blood samples are dealt with by the Investigating Agency in this case.

22. As per our direction Shri V. S. Pandav, Deputy Director, Regional Forensic Science Laboratory, Pune, Shri L. B. Gaikwad, Assistant Chemical Analyser R.F.S.L. Pune, who finalised the case and Shri S. H. Pawar, Assistant Chemical Analyser, who analysed the blood, are present in the court today. They also could not give satisfactory explanation for the lapse on the part of their officers. According to them there was too much workload on their office at the relevant time. This explanation cannot be accepted. Much depends

on the Chemical Analyser's report in a criminal case. The Chemical Analyser must set his house in order and not offer such unacceptable explanation to the court.

23. In several cases, we have seen similar apathy on the part of the police and the Chemical Analyser's office. It is unfortunate that they should overlook the serious implications of such lapses. We have on several occasions called high ranking officers to the court and repeatedly told them to take care. But things have not improved. We are distressed at this approach. The reasons why unmerited acquittals are on the rise are not difficult to find. We deprecate this callous indifference on the part of the police and the Regional Forensic Laboratory, Pune. We direct that copy of this judgment be sent to the Director General of Police, State of Maharashtra, Commissioner of Police, Pune and to the Regional Director of Forensic Science Laboratory, Pune, for appropriate action.

(SMT. RANJANA DESAI,J.)

(D. G. KARNIK, J.)

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Versus

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Mr. P.S. Hingorani, APP

CORAM:-SMT. RANJANA DESAI &

D. G. KARNIK, JJ.

DATED:-5/5/06

P.C.

. For the reasons separately recorded in the Judgment, this court has rejected the appeal.

(SMT. RANJANA DESAI,J.)

(D. G. KARNIK, J.)